IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ERIE INSURANCE PROPERTY & CASUALTY COMPANY, INC.

Plaintiff,

vs. **Civil Action No. 09-CV-00113**

CRAIG A. EDMOND, JANET EDMOND, DREAMLAND DEVELOPMENT, LLC, d/b/a PLEASANT DAY SCHOOLS, LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH, and CHRISTINA HATCHER MCGERVEY,

Defendants.

REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STAY ON BEHALF OF DEFENDANTS LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH, AND CHRISTINA HATCHER MCGERVEY

COME NOW, Defendants Latasha Henry, Donna Calandrella, Crystal Smith, and Christina Hatcher McGervey ("Employees") by counsel and submit the following reply in support of their motion to dismiss or, in the alternative, motion to stay.

In its response, Erie Insurance Property & Casualty Company, Inc. ("Erie") contends the Employees' motion to dismiss should be denied because an analysis of factors set forth in Nautilus Ins. Co. v. Winchester Homes, Inc., 15 F.3d 371 (4th Cir. 1994) favors federal jurisdiction. However, Erie's argument is not persuasive and should be rejected because it fails to consider that the terms of the policy, as applied to false imprisonment claims, are ambiguous and the law governing this issue has not been decided by the West Virginia Supreme Court of Appeals. Moreover, Erie downplays the factual questions that support the Employees' position with respect to the entanglement and efficiency factors. As such, the Court should grant

Employees' motion to dismiss or, in the alternative, stay this action pending the resolution of the state court action.

I. ARGUMENT

A. Employees' position that this case should be dismissed in favor of the state court action is supported factually and procedurally.

Initially, a few factual and procedural statements in Erie's response must briefly be addressed. First, Erie's claim that this case would be returned to the "starting gate" if the motion to amend is granted is not accurate. (Doc. 37 at 3.) Erie makes this assertion primarily because the Employees seek to add three additional defendants. However, those defendants are alter-ego companies of Pleasant Day Schools and the only claim against them is for piercing the corporate veil. The addition of the three alter-ego defendants does very little to alter the status of the case since the circuit court has limited discovery in the underlying action and has prevented the Employees from accessing specific financial information as it relates to the Edmonds and Pleasant Day Schools until later in the litigation. (See Henry v. Edmond, 08-C-547 (Mon. County Cir. Ct. Oct. 9, 2009) (order regarding Defendants' motion for protective order and Plaintiffs' motion to compel) (attached as "Exhibit 1"). Thus, the corporate veil claims will not be explored until the circuit court permits the Employees to do so and this would have been the case regardless of the Employees' request to amend the complaint. As such, Erie's argument to this effect should not have any impact on the Court's analysis.

Next, Erie asserts that it is "worth noting that the remaining Defendants to this action, namely Craig A. Edmond, Janet Edmond and Dreamland Development, LLC, d/b/a Pleasant Day Schools, have filed their Answer to Erie's Declaratory Judgment Complaint and have not affirmatively challenged the jurisdiction of this Court." (Doc. 37 at 4.) This fact should have no bearing on the Court's consideration. Employees' motion is not based on a jurisdictional issue.

Rather, it is a discretionary decision of whether the Court will entertain jurisdiction and such an analysis is not analogous to an assessment of personal jurisdiction. More specifically, although the Underlying Defendants joined in the Employees' motion to dismiss after filing an answer, a defendant in a declaratory judgment action does not waive the abstention argument by filing an answer, especially when the defendant raises abstention in the answer. See Fed. Exp. Corp. v. Tenn. Pub. Serv. Comm'n, 925 F.2d 962 (6th Cir. 1991); see also State Farm Mut. Auto. Ins. Co. v. Mallela, 175 F. Supp. 2d 401, 405 (E.D.N.Y. 2001) (deciding a motion to dismiss a declaratory judgment action on abstention grounds after an answer filed and treating it as a motion for judgment on the pleadings). Furthermore, in this case, in Affirmative Defense No. 5, the Underlying Defendants state "even if the United States District Court for the Northern District of West Virginia may properly have jurisdiction over the present case, an abstention from the assertion of jurisdiction of this case may be proper in light of the underlying action pending in the Circuit Court of Monongalia County, West Virginia." (Doc. 29 at 18.) Accordingly, Erie's suggestion that the abstention issue is waived by the Underlying Defendants' failure to raise the issue in a motion to dismiss prior to an answer is without merit.

B. Erie fails to show how the Nautilus factors weigh in favor of this Court retaining jurisdiction.

Contrary to Erie's argument, the Employees have met their burden and an analysis of the Nautilus factors weighs in favor of dismissal.

With respect to West Virginia's interest in having the issues raised in this declaratory judgment action decided in the Monongalia County Circuit Court, Erie posits "as guidance regarding determinations of coverage issues arising from claims of sexual harassment and other intentional and illegal conduct, plenty of West Virginia [l]aw is available to this Court." (Doc.

37 at 15.) (citing Smith v. Animal Urgent Care, 542 S.E.2d 827 (W. Va. 2000); Mun. Mut. Ins. Co. of W. Va. v. Mangus, 443 S.E.2d 455 (W. Va. 1994); Horace Mann Ins. Co. v. Leeber, 376 S.E.2d 581 (W. Va. 1988); W. Va. Fire & Cas. Co. v. Stanley, 602 S.E.2d 483 (W. Va. 2004); Farmers & Mech. Mut. Ins. v. Cook, 557 S.E.2d 801 (W. Va. 2001)). However, none of these cases deal with a situation analogous to this case: where employees have alleged false imprisonment claims against their employer and the insurance policy specifically provides for coverage of a false imprisonment claim.

Erie maintains that in addition to the "Employment-Related Practices" exclusion, Employees' false imprisonment claims are excluded by two other provisions: (1) Paragraph 60 which excludes injury "caused by or at the direction of the insured with knowledge that the act would violate the rights of another ("Knowing Violation of Rights"); and (2) and the "Criminal Act" exclusion. As applied to the false imprisonment claims, both of these arguments should be rejected.

Any argument that coverage is excluded under the "Criminal Acts" exclusion is premature at this juncture. In Bowyer v. Hi-Lad, Inc., 609 S.E.2d 895, 913 (W. Va. 2004), the West Virginia Supreme Court of Appeals held that in order for the "Criminal Acts" exclusion to apply it must be shown that the insured acted with "criminal intent." Further, it is "[e]xtremely difficult for the 'criminal acts' exclusion to apply because criminal intent must be proven beyond a reasonable doubt, while a jury in a civil case need only apply a preponderance of the evidence test to find intent." Accordingly, the West Virginia Supreme Court of Appeals construes this exclusion narrowly and the Court should not find that, given the allegations in the complaint, this provision unquestionably bars coverage. Moreover, regardless of how narrowly this exclusion is construed, like the "Employment-Related Practices" exclusion, the application of this exclusion still creates ambiguity in the insurance policy when applied to a false imprisonment cause of action because the policy indicates it covers claims of false imprisonment, which could also be a criminal act. See generally W. Va. Code § 61-2-14. Because any ambiguity should be construed in favor of the Employees, the Court should find this is not a straightforward application of West Virginia law. Id. at 912 ("With respect to general aspects of contractual interpretation involving insurance policies, we have held that '[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.'"); syl. pt. 5, Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 356 S.E.2d 488 (W. Va. 1987), modified on other grounds by, Potesta v. U.S. Fid. & Guar. Co., 504 S.E.2d 135 (W. Va. 1998) ("Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated."); Payne v. Weston, 466 S.E.2d 161, 166 (W. Va. 1995) ("Where a provision of an insurance policy is ambiguous, it is construed against the drafter, especially when dealing with exceptions and words of limitation.").

Erie's attempt to implicate the "Knowing Violation of the Rights of Another" exclusion fails for similar reasons. As the court in Nautilus Ins. Co. v. BSA Ltd. P'ship, 602 F. Supp. 2d 641, 654 -656 (D. Md. 2009) noted, this exclusion is not applicable where allegations in the underlying complaint assert that the defendant intended to commit the *acts* that violated the plaintiff's statutory right, but did not assert that the defendant intended to violate the statutory right itself. In other words, according to the court, "though the [complaint alleges that the defendant] knowingly failed to accept the vouchers and execute the lease addenda, the [complaint] did not allege, . . . that [the defendant] knowingly violated the [plaintiff's] right of occupancy." Id. at 656.

In BSA Ltd., the court found that because the plaintiff did not (and need not) allege that the defendant *knew* it was violating the rights of the plaintiff, the policy's intent exclusion did not preclude coverage. Id. Importantly, the court explained, "if all intentional acts came within the scope of the intent exclusion, coverage would be precluded for personal and advertising injuries ***specifically covered*** in Coverage B. For example, ***false imprisonment***, a specifically covered offense, requires a showing of intent. If the intent exclusion precluded coverage for false imprisonment claims, litigation coverage for suits bringing those claims would be illusory."[1] Id. at n.7 (emphasis added) (citing Secura Ins. Co. v. Gorsick, No. 3:06CV-596R, 2008 WL 341383, at *5 (W.D. Ky. Feb. 6, 2008) (finding that the intent exclusion did not preclude coverage of a malicious prosecution claim because, even though malicious prosecution requires "an evil, or unlawful motive, or purpose," and the intent exclusion prohibits coverage for injuries caused by actions made with such intent, this self-contradictory policy language should be construed "narrowly so as to render the insurance effective, resolving any doubt as to the coverage or terms in favor of the insured").

For these reasons, neither the "Criminal Acts" exclusion nor the "Knowing Violation of the Rights of Another" exclusion preclude coverage for Employees' false imprisonment claims and it is apparent that the issues raised herein are not a straightforward application of West Virginia law. See generally Camden-Clark Mem'l Hosp. Assoc. v. St. Paul Fire & Marine Ins. Co., 682 S.E.2d 566, 574 (W. Va. 2009) ("An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of the exclusion.") (citation and quotation marks omitted).

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[1] Conversely, "finding the intent exclusion itself superfluous would also fail to give effect to all of the contractual provisions." Id. (citing Nat'l Cas. Co. v. Lockheed Martin Corp., 415 F. Supp. 2d 596, 602 (D. Md. 2006). The court reasoned, in order "to reconcile the intent exclusion with the listed offenses is to give effect to the intent exclusion only when intent is not an element of the listed offense. Offenses involving 'invasion of the right of private occupancy' may not necessarily require a showing of intent. The intent exclusion, therefore, would preclude coverage when only an intentional violation of the right is alleged in the complaint." Id.

As its last line of defense, Erie relies on the "Employment-Related Practices" exclusion. Thus, because Erie's first two exclusions are not applicable, the Court would have to consider the "Employment-Related Practices" exclusion as it applies to false imprisonment claims, which as set forth in Employees' opening brief, has not been done by the West Virginia Supreme Court of Appeals. (See Doc. 33 at 8-13.) The issue is unresolved by a West Virginia state court and therefore, the state has a significant interest in this action. Importantly, the issue is not whether the question has been decided by a federal court, which is the position advocated by Erie, it is whether the West Virginia Supreme Court of Appeals has settled the issue presented. There is no doubt this Court could conduct a thorough analysis of the issue, but that is not the inquiry, the inquiry is whether it should, and, in these circumstances, because the West Virginia Supreme Court of Appeals has not done so, it is Employees' position that the state court has a significant interest in resolving this matter.

Next, in its efficiency argument, Erie fails to consider that facts must be developed and the state court remains the best forum to hear those facts and resolve any factual disputes. Moreover, the Court should disregard Erie's argument that the Employees have undertaken any gamesmanship as the Employees explained in their opening brief the reasons for not filing suit against Erie prior to this action. (See Doc. 33 at 8-9; Doc. 37 at 10 n.1.) Additionally, it should also be noted that the Employees' second amended complaint, if granted by the state circuit court, would implicate other causes of action, namely the Negligent Supervision/Retention claim, which would thereby require Erie to amend its complaint in the federal action and possibly trigger insurance coverage. See, e.g., Westfield Ins. Co. v. Tech Dry, Inc., 336 F.3d 503 (6th

Cir. 2003); Am. Employers Ins. Co. v. Doe, 165 F.3d 1209 (8th Cir. 1999) (claims for negligent decision to hire and retain an employee qualify as an "occurrence" under some policies). It would be easier for the parties to have Erie respond in the state court action.

Erie's argument regarding entanglement likewise fails because even if the other exclusions are implicated, there must be some inquiry by this Court into the factual issues currently being litigated in the state court proceeding. Finally, with respect to procedural fencing, Erie incorrectly refers to the Employees' course of action in the state court litigation as a consideration. This factor is reserved for the party seeking declaratory judgment in a federal court. See generally State Farm Fire & Cas. Co. v. Kirby, 919 F. Supp. 939, 945 (N.D. W. Va. 1996).

II. CONCLUSION

For the reasons stated above, and for the reasons set forth more fully in the Employees' memorandum of law in support of their motion to dismiss, this Court should dismiss Erie's declaratory judgment action or, in the alternative, stay this action pending the resolution of the underlying state court proceeding.

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Defendants.

CERTIFICATE OF SERVICE

I, Julia Chico Abbitt, counsel for Defendants, certify that service of "REPLY IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE STAY, ON BEHALF OF DEFENDANTS LATASHA HENRY, DONNA CALANDRELLA, CRYSTAL SMITH, AND CHRISTINA HATCHER MCGERVEY" has been served upon the following parties via ECF and/or U.S. Mail, as appropriate, on this the 10th day December, 2009 as follows:

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